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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. 2:21-CR-111-WBS
)	
Plaintiff,)	MOTION TO STRIKE VICTIM IMPACT
)	STATEMENTS
vs.)	
)	
ROBERT POOLEY,)	Date: September 30, 2024
)	Time: 10:00 A.M.
Defendant.)	Judge: Hon. William B. Shubb
)	

Robert Allen Pooley hereby moves to strike the victim impact statements of Todd and Francine Turner, which were submitted as an addendum to the Presentence Investigation Report ("PSR") by United States Probation on September 23, 2024, Dkts. 171, 171-1, and by email to the Court on September 27, 2024. The defense does not intend to minimize the horrible pain and trauma that the Turners have faced from the death of their son; however, this case is not the correct forum for them to be heard. Because the Turners are not directly and proximately harmed as a result of the commission of Mr. Pooley's offenses of conviction or the fraudulent scheme underlying those convictions, they are not crime victims with enforceable rights under 18 U.S.C. § 3771.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Pooley has been convicted of Counts Two and Three of the Indictment, both alleging Wire Fraud, in violation of 18 U.S.C. § 1343. The fraudulent scheme presented by the government at trial involved the collection of payment from tandem instructor candidates who

1 enrolled in Mr. Pooley's Tandem Instructor Course with the expectation of receiving their
2 Tandem Instructor Rating, which Mr. Pooley could not provide.

3 In preparation for sentencing, United States Probation prepared a PSR, which lists the
4 victims of the offense as "the students who paid the defendant for tandem instructor courses
5 under fraudulent pretenses." See PSR, Dkt. 165, at ¶ 34. In an addendum filed September 23,
6 2024, however, Probation filed several victim impact statements that were received by the
7 United States Attorney's Office, including two statements by Todd Turner. See Dkt. 171, 171-1.
8 In addition, on September 27, 2024, the government provided, by email, an additional victim
9 impact statement by Francine Turner. The Turners were not skydiving students who paid Mr.
10 Pooley for a Tandem Instructor Course. Rather, they are the parents of a young man who passed
11 away while on a tandem skydive jump with Mr. Kwon.

12 II. LEGAL STANDARD

13 Under the Crime Victims' Rights Act ("CVRA"), federal crime victims are guaranteed
14 several rights in connection with the prosecution of an offense, including the "right to be
15 reasonably heard at any public proceeding in the district court involving release, plea,
16 sentencing, or any parole proceeding," among others, including restitution. 18 U.S.C. §
17 3771(a)(4). Pursuant to the statute, "the term 'crime victim' means a person directly and
18 proximately harmed as a result of the commission of a Federal offense or an offense in the
19 District of Columbia." *Id.* at § 3771(e)(2)(A). This definition is nearly identical to a "victim"
20 under the Victim and Witness Protection Act ("VWPA"), which provides that a victim is "a
21 person directly and proximately harmed as a result of the commission of an offense for which
22 restitution may be ordered." *Id.* at § 3663A(a)(2).

23 Indeed, as a result, "[f]ederal courts apply the same legal standard to the VWPA and the
24 CVRA in determining a claimant's victim status." *United States v. Thuna*, 382 F. Supp. 3d 166,
25 170 (D.P.R. 2019) (citing *In re McNulty*, 597 F.3d 344, 350 n.6 (6th Cir. 2010) ("[W]e find our
26 case law construing the VWPA . . . persuasive, both for how the CVRA is to be interpreted
27 procedurally and for when an individual qualifies as a victim."); *In re Rendon Galvis*, 564 F.3d
28 170, 173–76 (2d Cir. 2009) (applying the same analysis to the VWPA and the CVRA in finding

1 that the claimant was not a victim pursuant to the statutes); *Credit Suisse AG*, No. 14-188, 2014
 2 WL 5026739, at *3 (applying “the same analysis to the definitions of ‘victim’ ” pursuant to the
 3 VWPA “and ‘crime victim’ ” pursuant to the CVRA)).

4 It is well-settled that, generally, an individual is considered a victim under the CRPA and
 5 the VWPA if he or she suffers loss that flows directly from the specific conduct that is the basis
 6 of the *offense of conviction*. See *United States v. May*, 706 F.3d 1209, 1214–15 (9th Cir. 2013).
 7 “Thus, a court is authorized to order restitution for the offense of conviction and not for other
 8 related offenses of which the defendant was not convicted.” *Id.* (internal quotations and citations
 9 omitted). There is one exception, however, for cases in which the offense of conviction involves
 10 as an element a scheme, conspiracy, or pattern of criminal activity. 18 U.S.C. § 3663A(a)(2). In
 11 those cases, there may be victims for losses resulting from any conduct that was part of the
 12 scheme, conspiracy, or pattern of criminal activity. *United States v. Reed*, 80 F.3d 1419, 1423
 13 (9th Cir. 1996).

14 III. ARGUMENT

15 Here, because Mr. Pooley has been convicted for an offense in which an element is a
 16 fraudulent scheme, a “victim” of that offense is someone who was directly and proximately
 17 harmed as a result of the commission of the offense of conviction, or conduct that was part of
 18 that scheme, conspiracy or pattern of criminal activity. *Reed*, 80 F.3d at 1420, n.1.

19 While the Turners suffered the incredible loss of their son, that loss was not directly and
 20 proximately caused by the conduct forming the basis of Mr. Pooley’s convictions, or any
 21 underlying fraudulent scheme. Mr. Pooley’s representations to his students about their ability to
 22 receive “ratings” was not connected to the skydiving accident that killed Mr. Kwon and the
 23 Turners’ son.

24 The government claims that Mr. Pooley’s failure to properly train students caused the
 25 accident and resulting deaths, which the defense disputes. See Dkt. 175-1. The government
 26 requests a guidelines enhancement on that basis. But even if the government were correct, it has
 27 not demonstrated that Mr. Pooley’s misrepresentations led proximately to Mr. Kwon and his
 28 passenger perishing.

1 First of all, as noted in the defendant's filing at Docket No. 175-1, it is unclear which of
 2 Mr. Pooley's students were part of the scheme forming the basis for the convictions. As the
 3 Court observed in granting the judgment of acquittal as to Count 5,

4 there was no evidence presented as to whether Kwon even saw Garmashov's signatures
 5 on his paperwork, much less evidence showing that defendant used those signatures to
 6 defraud or deceive him. Indeed, there was no evidence that tandem instructor candidate
 7 Yonghyeon Kwon saw his certification paperwork or even knew Garmashov's signatures
 8 were on the paperwork. At best, there was evidence that other alleged victims were
 9 aware of the Garmashov's purported signature on their forms, but that did not constitute
 10 evidence of what, if anything, Kwon saw or knew.

11 Dkt. 170 at 10–11. It is unclear whether Mr. Kwon therefore was a victim of the wire fraud
 12 offense. If he is not a victim of the wire fraud offense, there is no basis for the passenger on one
 13 of his jumps to be a victim of the wire fraud offense either.

14 But even if Mr. Kwon was proven to be a victim, and even if the accident were
 15 considered "relevant conduct," any victim of that skydiving accident would not be a "victim" of
 16 the offense of conviction. Indeed, the specific content and adequacy of Mr. Pooley's trainings
 17 are not related to the elements of Mr. Pooley's offenses of conviction and the related fraudulent
 18 scheme.

19 On this basis, courts have specifically rejected claims for victim status and restitution
 20 stemming from a defendant's "relevant conduct," or conduct that is not an element of the offense
 21 of conviction. *See Reed*, 80 F.3d at 1420–23 (9th Cir. 1996); *see also United States v. Freeman*,
 22 741 F.3d 426, 434–35 (4th Cir. 2014). In *Reed*, for example, the Ninth Circuit reversed a district
 23 court's restitution order for losses related car damage resulting from the defendant's high-speed
 24 flight from law enforcement. *Id.* at 1420–21. There, the defendant had been convicted of felon
 25 in possession of a firearm, but also properly received a sentencing enhancement for reckless
 26 endangerment during flight, based on his flight and damage to the stolen car the defendant was
 27 driving. *Id.* Nevertheless, the panel reversed the lower court's restitution order based on the car
 28 damage on the grounds that it did not stem from the defendant's convicted conduct. *Id.*

29 IV. CONCLUSION

30 In light of the foregoing, Mr. Pooley moves to strike the victim impact statements
 31 provided in the addendum to the PSR at Dkt. 171-1 and by email to the Court on September 27,

2024.

Respectfully submitted,

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Date: September 27, 2024

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